UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

3815 9TH AVENUE MEAT AND PRODUCE CORP., d/b/a COMPARE SUPERMARKET

and Case Nos. 2-CA-67534

2-CA-69894 2-CA-70807

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 342

Simon-Jon H. Koike, Esq. and Julie Polakoski, Esq., for the Acting General Counsel Joseph S. Rosenthal, Esq., for the Respondent Jonathan Friedman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges filed on October 25, 2011, November 30, 2011 and December 15, 2011, the last amended on January 12, 2012, by United Food and Commercial Workers Local 342 ("Local 342" or "the Union"), a Consolidated Complaint and Notice of Hearing issued on December 20, 2011, and a Complaint issued on February 17, 2012, which were consolidated by Order dated February 22, 2012. The Consolidated Complaint alleges that 3815 9th Avenue Meat and Produce Corp., d/b/a Compare Supermarket ("Compare" or "Respondent") violated Sections 8(a)(1) and (3) of the Act by discharging five employees on October 22, 2011 in retaliation for their activities on behalf of the Union, and discharged an employee on December 12, 2011 in retaliation for his Union and protected concerted activities. The Consolidated Complaint also alleges that Respondent violated Section 8(a)(1) by coercively interrogating employees on October 22, 2011. Respondent filed Answers to the December 20, 2011 Consolidated Complaint and the February 17, 2012 Complaint, denying the material allegations. This case was tried before me on March 5, 6, and 7, 2012, in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the "General Counsel") and the Respondent, I make the following

¹ Counsel for the Acting General Counsel withdrew this allegation in his Post-Hearing Brief.

Findings of Fact

I. Jurisdiction

Respondent is a domestic corporation with an office and place of business located at 3815 9th Avenue, New York, New York, where it is engaged in the operation of a retail supermarket. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all material times Local 342 has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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A. Respondent's Operations, Supervisory and Managerial Personnel

Compare is owned by Porfirio Damiani, who is Respondent's President. Pedro Riezgo, one of Damiani's sons, has been the general manager of the supermarket since 2006. Riezgo has overall responsibility for the store's operations, and the store's department supervisors report to him. Another of Porfirio Damiani's sons, Anthony Damiani, is the assistant manager. The supermarket is organized into seven departments – grocery, dairy, produce, frozen, deli, meat, and outdoor – each of which has its own supervisor. Rafael Grullon is the supervisor for the grocery department, and Ramon Calderon, also known as Bolivar, is the supervisor for the meat department. Respondent admitted in its Answer and I find that Porfirio Damiani, Pedro Riezgo, Rafael Grullon, and Ramon Calderon are supervisors within the meaning of Section 2(11) of the Act.

Compare's business runs in a predictable cycle during the course of a month. During the first two weeks of each month, the store is busier, and during the last two weeks of the month, the store is relatively quiet. Respondent attributes this regular fluctuation in business to the fact that a good percentage of its clientele subsists on government benefits that are paid to them early in the month.

Compare's clientele is predominantly Spanish-speaking, as are its employees. As a result, Riezgo and the supervisors typically communicate with the employees in Spanish.

B. Activities of Respondent's Employees on Behalf of Local 342

On July 21, 2011,² Local 342 filed a petition in Case No. 2-RC-66179 for a representation election in a unit of all full-time and regular part-time meat department employees at Compare and at a C-Town Supermarket located at 1314 St. Nicholas Avenue, New York, New York, as joint employers. On September 1, the Acting Regional Director, Region 2, issued a Decision and Direction of Election finding that the two entities did not constitute a joint employer, and directing an election in a unit of meat department employees at Compare only. An election was conducted on October 9, and Carlos Sanchez served as an observer on behalf of Local 342 during the balloting. The Union won the election, and was certified on October 18.

² All subsequent dates are in 2011 unless otherwise indicated.

Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, and Barido Rodriguez Tejada were employed by Compare in its grocery department. They worked on the store's selling floor, stocking shelves both inside and outside the building. Castillo, Tejada and Munoz testified that they learned of Local 342 from Javier Garcia, an employee in the meat department. Castillo, Tejada, Santos, and Nunez testified that in the days after the representation election in the meat department, they discussed the Union several times with Garcia, and with Munoz.³ These conversations took place in the break room and in the area where merchandise is stored. After several discussions, the grocery department employees decided to join the Union, and obtain Union representation for their department. On October 19, Castillo, Santos, and Tejada reported to Garcia that the grocery department employees were interested in union representation, and asked him for assistance. Garcia told Tejada that the grocery employees needed to sign union authorization cards. On October 21, Tejada and Santos filled out and signed union cards, which Garcia returned to Local 342 organizer Irmaliz Fontanez that same day. Nunez also filled out a union card on October 21, but did not actually sign it.

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Nunez testified that on October 22, he arrived at the store to begin working at 7:00 a.m. While in the storage area, he saw supervisor Rafael Grullon, and told Grullon that he was going to join the Union. Grullon responded that he supported the employees, but that he would not become involved. Castillo testified regarding a similar conversation with Rafael Grullon on October 22. Castillo arrived at the store that day before 1:00 p.m. to begin his shift, but Grullon told him that he was to begin work at 2:00 p.m. instead. Castillo testified that he told Grullon that the grocery department employees were going to join the Union. Grullon asked Castillo which employees, and Castillo identified Santos, Nunez, and Tejada. Grullon responded that he was not going to become involved, because he had worked with management for many years and was very thankful to them. Grullon said that everyone had a right to fight for what they wanted, but that he was not going to become involved.⁴

Local 342 organizer Irmaliz Fontanez testified that she was involved in the organizing campaign and representation election in Compare's meat department. Fontanez testified that during the week of October 18, she met with Garcia, who informed her that the grocery department employees wanted to join the Union. Fontanez gave Garcia blank union authorization cards, and on October 21, Garcia returned cards to her completed by Tejada and Santos.

C. The October 22 Discharge of Castillo, Munoz, Nunez, Tejada, and Santos

Castillo, Munoz, Nunez and Santos were all scheduled to work on Saturday, October 22. Castillo testified that on October 22, after his conversation with Grullon regarding the Union, he went to the lunchroom. However, before he could begin work at 2:00 p.m., Riezgo instructed him not to punch in, and sent him home. Riezgo told him to return to the store on Monday, October 24, and wait for his payment. Castillo remained at the store to wait for his paycheck, but when none was forthcoming he went home. Munoz testified that he was eating his lunch when he heard Grullon, Tavarez, and another grocery employee named Concepcion Torreblanca called over the intercom. When Munoz went to the office with this group, Riezgo told the employees that they were "gone," and that they should punch out at 2:00 p.m. and return on Monday to pick up their checks. Nunez testified that Riezgo approached him at

³ Carlos Sanchez also testified that he observed Castillo and Tejada speaking with Garcia in the storage area regarding organizing the grocery department employees for union representation.

⁴ Riezgo testified that Grullon never reported these conversations to him. Grullon did not testify at the hearing.

approximately 2:00 p.m. in the lunchroom, and told him to punch out and go home. Riezgo told him to return to the store on Monday.

Santos was scheduled to work on October 22, beginning at 2:00 p.m. However, while he was on the bus on the way to the store, Grullon called him and told him not to come to work. Grullon told him that he should come in instead on October 24 to talk. Tejada was not scheduled to work on October 22, but was called by Grullon that day. Grullon told Tejada not to come into work on Sunday, October 23, his next regularly scheduled day. Grullon said that instead, Tejada should come to the store on October 24 to meet with Riezgo.

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Riezgo confirmed that on October 22, between 1 p.m. and 2 p.m., either he or Grullon spoke to Castillo, Munoz, Nunez, and Torreblanca and told them that they should go home and return on Monday, October 24. Riezgo testified that he asked Grullon to call the grocery department employees who were not at the store, Santos and Tejada, and tell them that they were not to return until Monday. Riezgo testified that he then reported to Porfirio Damiani that he had sent the grocery department employees home and instructed them to return on Monday. Riezgo testified that he informed Porfirio Damiani that the grocery department employees were selected for layoff in inverse seniority order. Riezgo testified, however, that he did not discuss layoffs with Rafael Grullon until after he and Porfirio Damiani had decided to implement them. Riezgo testified that only after implementing the layoffs did he ask Grullon whether he could operate the grocery department without the employees. According to Riezgo, Grullon insisted that he needed Torreblanca, and Riezgo then rescinded Torreblanca's layoff.

Riezgo testified that he and Porfirio Damiani discuss the store's sales and review its payroll every week. Riezgo testified that beginning in late 2009, Porfirio Damiani began insisting that the payroll be cut, and employees be laid off. Riezgo testified that since that time, Porfirio Damiani has pressed him to eliminate employees two to three times per month. Indeed, Riezgo testified that at the time of the hearing Porfirio Damiani was still pressuring him to cut payroll. Riezgo testified that prior to laying off the grocery department employees on October 22, he consulted with Porfirio Damiani, and decided to eliminate six employees in the grocery department. Riezgo testified that this decision was made a few days before the layoffs occurred.

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Castillo and Santos testified that they returned to the store together on October 24, at about 10:00 a.m. Riezgo saw them and gave them their paychecks. Santos testified that Riezgo said that he didn't need the employees anymore, and that there was no more work. Castillo and Santos testified that they asked Riezgo why the employees had been fired, and Riezgo said that he had no explanation, or that he did not have to explain. Munoz testified that when he returned alone to Compare on October 24, Riezgo gave him an envelope, and asked him to sign. Munoz asked Riezgo why he was being fired, and Riezgo, while initially stating that the company did not have enough money to pay him, also stated that the man from the meat department called the Union. Munoz asked which man, and Riezgo replied, "Javier." Munoz testified that Grullon was present during this conversation.

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Tejada testified that he went to Compare on October 24 at noon, and saw Riezgo in front of the supermarket. Riezgo was leaving the store, and asked Tejada to wait for him. When Riezgo returned a half hour later he called Tejada to the office. Riezgo told Tejada that he had to let Tejada go because business was too slow, and that he wanted to retain the employees that had started working at Compare first. Tejada asked if that was why Riezgo was firing him, and Riezgo said that it was nothing personal, but business was slow.

⁵ Porfirio Damiani did not testify at the hearing.

Nunez testified that he did not return to Compare on October 24, because he had a doctor's appointment. Instead, he called Compare twice on October 24, and asked for Riezgo, but the secretary told him that Riezgo was not there. Later Nunez spoke to Castillo, who told him that everyone had been fired. Nunez returned to the store on another day, and picked up his paycheck.

D. The Employment and Discharge of Carlos Uceta Sanchez

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Carlos Uceta Sanchez began working for Compare in July 2007, and worked at the counter in the meat department, serving customers, until December 12. His supervisor was Ramon Calderon, also referred to as "Bolivar."

Sanchez first heard about Local 342 in July from a co-worker. As discussed above, he served as the Union's observer at the election on October 9. Riezgo was present at the ballot count that day, while Sanchez was serving as the Union observer.

In the meat department, a box for tips from customers was kept at the counter where customers are served. This box was fastened to the counter with a chain and a lock. Sanchez had the key for the lock, and was responsible for opening the tip box and evenly dividing and distributing the tips left in the box each week to the meat department employees who worked at the counter. Sanchez testified that the tip box typically contained between \$400 and \$900 at the end of each week.

On Sunday, December 11, when Sanchez arrived at work, other meat department employees told him that all of the money had been removed from the tip box. When Sanchez inspected the box, he found that the handles were broken. Sanchez testified that he told his coworkers in the meat department that the box had been broken and the money stolen, and asked a co-worker to speak to Riezgo about it. This co-worker reported back to Sanchez that Riezgo had told her that management would check video tapes from a security camera in the meat department later on to try to discover who had taken the money. Riezgo told her that he did not have time to do so immediately. Meat department employee Edwin Canela-Beato confirmed during his testimony at the hearing that approximately five meat department employees were discussing the theft of money from the tip box that morning. Riezgo confirmed during his testimony that one other meat department employee, in addition to Sanchez, spoke to him regarding the theft of money from the tip box.

Sanchez spoke with Riezgo about the theft of tips, and asked him to check the video recordings, but Riezgo told Sanchez that he was too busy to do so. Sanchez testified that he responded that if money was missing from the office Riezgo would take the time to investigate it. Riezgo said that he would check the video tape when he had the time.

The next day, December 12, Sanchez again asked Riezgo about the tip box. Riezgo testified that he told Sanchez to speak with Anthony Damiani, because Damiani was more familiar with the security cameras. Sanchez then asked Anthony Damiani if he had checked the video, and Damiani responded that he had not had time to do so. Damiani said that he would check the video later. Sanchez reported to his co-workers in the meat department that management had not yet checked the video, and one of the other employees suggested calling the police.

Damiani confirmed during his testimony that Sanchez asked him to review the videotapes made by the surveillance cameras to determine who took money from the tip box.

Damiani testified that Sanchez first asked him to review the footage on December 11. Damiani testified that he told Sanchez that he would check the surveillance footage when he had time to do so. Damiani testified that when he arrived at work on December 12 at approximately 1:00 p.m., Sanchez again asked him about reviewing the footage. Damiani said that he had not had time to do so the previous day, but would try to get to it. Damiani testified that reviewing the surveillance footage would have taken approximately three hours, and as a result he did not have time to do so until Tuesday, December 13.

Sanchez testified that meat department employee Richard Reyes called the police, and when the police arrived Reyes and Ricardo Richardson, another meat department employee, spoke to them. Beato confirmed during his testimony that the police spoke to Reyes and Richardson, but because Beato does not understand English he did not know what was said. The police inspected the tip box, and then went to the office.

Anthony Damiani testified that the police officers asked him whether he was aware that money was missing from the tip box. Damiani responded that he preferred to deal with the matter himself, and that he intended to review the videotape footage when he got a chance. The police officers told him that was fine, so long as it was done in a timely manner. According to Damiani, the police officers also suggested that the tip box be removed until the situation was resolved. Riezgo testified that Anthony Damiani then related the substance of this conversation to him. Damiani told Riezgo that the police had suggested that the tip box be removed, since it was already damaged. Riezgo and Damiani then asked Ramon Calderon to remove the tip box.

Sanchez testified that at approximately 3:00 p.m., Calderon told him that Riezgo did not want the tip box on the counter, and ordered Sanchez to remove it. Sanchez told Calderon that the key for the tip box was at home. When Sanchez returned from lunch, Riezgo asked him why he had not removed the tip box. Riezgo testified that he told Sanchez that the police had suggested that they have the tip box removed. Sanchez explained that he had left the key at home, and said that he would look for something to cut the chain with. Riezgo then gave grocery department employee Jose Resio large clippers, and Resio cut the chain.

Sanchez testified that he and Riezgo then discussed the tip box further near the meat counter. According to Sanchez, he asked Riezgo if the box was being removed temporarily until the video was checked, or permanently. Riezgo asked why Sanchez called the police on him. Riezgo said that he did not want the tip box on the counter any more, because it was only causing him problems. Riezgo then said that the problems in the supermarket were caused by the workers in the meat department. Sanchez responded that the problems in the supermarket were caused by Riezgo's mistreatment of the employees, and that Riezgo was treating the employees "like a bag of shit." Sanchez denied using the word "shit" to refer to Riezgo himself.

Riezgo testified that as he, Sanchez, and Resio were proceeding to the meat department so that Resio would cut the chain on the tip box, Sanchez asked why management was removing the tip box. Riezgo testified that he told Sanchez the police had suggested that the box be removed. Riezgo testified that Sanchez then said that the supermarket treated the employees like shit, or that he was not like one of the other employees and was not going to be treated like shit. Riezgo testified that Sanchez was yelling as he made these statements. Riezgo responded that Sanchez should take the rest of the day off because he seemed upset. Riezgo testified that Sanchez then said that instead of going home, he would rather quit. Riezgo then called Calderon to give Sanchez his paycheck. When Calderon returned, Sanchez said that no one could stop him from finishing his shift, and no one could take him out of the department. Sanchez testified that he never told anyone that he was quitting on December 12.

Sanchez testified that Beato was present during this conversation with Riezgo. Beato testified that during the discussion Sanchez was about five to six feet away from him, and Riezgo was about fifteen feet from away. Grocery department employee Jose Resio, who had been sent to cut the chain on the tip box, was also nine or ten feet away from the discussion. Beato testified that he only heard what Sanchez said to Riezgo. Beato testified that Sanchez told Riezgo that he, Sanchez, was not like the other employees. Beato testified that Sanchez told Riezgo that they were treating the employees like shit, but that Riezgo was "more shit," or "the bigger shit."

Resio also testified at the hearing. Resio testified that Sanchez asked Riezgo why he hadn't reviewed the videotape, and Riezgo said that his brother (Damiani) had to review it. Resio testified that Sanchez became upset, and told Riezgo in a loud voice that Riezgo could not treat him like a pile of shit. According to Resio, Riezgo then told Sanchez to take the day off, and Sanchez replied that if Riezgo wanted him to leave he would have to fire him.

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Sanchez testified that there were other employees behind the meat counter during his argument with Riezgo, and that there were customers at the meat counter at the time. Beato confirmed this testimony. Resio testified that there were eight to twelve customers present near the meat counter during the discussion, and about four employees behind the meat counter at the time.

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After Sanchez and Riezgo's discussion, Sanchez returned to work at the meat department counter, and Calderon was called to the office over the intercom. Sanchez testified that when Calderon returned from the office, he told Sanchez that Sanchez had to leave. Sanchez responded that if Riezgo wanted to him to leave, Riezgo had to give him a letter firing him. Sanchez testified that he kept working, and eventually Calderon again went to the front of the store. Sanchez testified that when Calderon returned, he told Sanchez that Sanchez should leave, because Riezgo did not want Sanchez in the store. Sanchez continued working, and eventually was called to the office at approximately 5:00 p.m.

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Sanchez testified that when he went to the front of the store, Riezgo told him that he had worked until 5:00 p.m., and that he would prepare an envelope with Sanchez's pay. Riezgo then punched Sanchez out on the time clock. Sanchez responded that he was scheduled to work from 2:00 p.m. to 10:00 p.m., and returned to his work area. Calderon was called to the front of the store again, and eventually returned with Sanchez's pay. Calderon then told Sanchez to get out of the store, that Riezgo did not want him in the store and was paying his hours until today. Sanchez then told his co-workers that he was fired, and went to change his clothing. Other employees discussed protesting Sanchez's discharge, and Richardson actually did so by walking out.

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Beato testified that after Sanchez was given his pay, he saw Sanchez and Calderon in the changing room talking. Beato asked Sanchez what happened, and Sanchez said that he was fired. Calderon remained silent, and then left. Richardson then entered the changing room, and asked Sanchez what had happened. Sanchez said that he had been fired, and Richardson proposed to Beato that they quit in protest. Sanchez advised Beato not to quit, and Beato continued to work. Beato still works for Compare in the meat department.

According to Riezgo, he reviewed the videotapes of the meat counter the next day, which revealed that an employee of Respondent's cleaning subcontractor had taken the money. The money was returned and given to Calderon.

III. Analysis and Conclusions

A. Respondent Violated Sections 8(a)(1) and (3) by Discharging Castillo, Munoz, Nunez, Tejada and Santos in Retaliation for their Union Support and Activities

1. General Principles

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Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an employee's discharge violated the Act in this manner, the Board applies the analysis articulated in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). To establish an unlawful discharge under Wright Line, the General Counsel must first prove, by a preponderance of the evidence, that the employee's union sympathies or activities were a substantial or motivating factor in the employer's decision to take action against them. Manno Electric, Inc., 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's union support or activity, employer knowledge of that activity, and animus against the employee's protected conduct. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive may be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. Ronin Shipbuilding, 330 NLRB 464 (2000); Robert Orr/Sysco Food Services, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee's union support or activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

In cases such as this involving the simultaneous discharge of a group of employees, General Counsel need not prove specific union activities, or employer knowledge, with respect to each employee. *See, e.g., Flat Rate Movers, Ltd.*, 357 NLRB No. 112, at p. 8 (2011), *citing Delchamps, Inc.*, 330 NLRB 1310, 1317 (2000). The Board has held that even employees who had engage in no union activities at all may be unlawfully discharged where they are inadvertently "swept into the unlawful group discharge" caused by an employer's "housecleaning mission to rid itself of" union supporters. *City Stationery, Inc.*, 340 NLRB 523, 524 (2003).

2. General Counsel has Established a Prima Facie Case

I find that General Counsel has established a *prima facie* case that Castillo, Munoz, Nunez, Santos, and Tejada were discharged in retaliation for activities on behalf of Local 342. The evidence demonstrates that all of these employees engaged in activities on behalf of the Union by meeting with one another and with Garcia to discuss joining the Union, and obtaining Union representation for the grocery department. The evidence establishes that the grocery employees met several times after the representation election in the meat department on October 9 in the break room and the storage area, and that at least one of these meetings took

place on October 19. The evidence further establishes that they obtained union authorization cards from Garcia, which Tejada and Santos signed and returned to him.

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I find that the evidence overall demonstrates that Respondent knew of the employees' activities on behalf of the Union prior to discharging them. I credit Castillo and Tavarez's testimony that when they began their shifts on October 22, they informed grocery department supervisor Grullon that they were going to join the Union. I further credit Castillo's testimony that Grullon asked him which employees intended to join the Union, and that Castillo identified Nunez, Santos, and Tejada. Because Grullon did not testify at the hearing, Castillo and Tavarez's testimony regarding their conversations with him is unrebutted, and there is no disputed issue of fact as to whether they occurred. See, e.g., Bally's Atlantic City, 355 NLRB No. 218, at p. 7 (2010), enf'd, 646 F.3d 929 (D.C. Cir. 2011).

The evidence establishes that Munoz was not part of the group identified by Castillo to Grullon. However, there is no dispute that Munoz was included in what was admittedly a group discharge which, as discussed below, the evidence establishes was unlawfully motivated. The evidence also establishes that Munoz was involved in the grocery employees' discussions regarding Union representation. As a result, I find that the lack of evidence that Munoz was specifically identified to Respondent as a union supporter is not fatal to a contention that his discharge was discriminatory. See, e.g., Flat Rate Movers, Ltd., 357 NLRB No. 112, at p. 8; City Stationery, Inc., 340 NLRB at 524.

I further find it appropriate to draw adverse inferences in connection with the discharge of the grocery department employees based upon Respondent's failure to call Rafael Grullon as a witness. Grullon is still employed by Respondent, and Respondent admitted in its Answer that Grullon is a supervisor within the meaning of Section 2(11) of the Act, or an agent acting on its behalf within the meaning of Section 2(13). Furthermore, Grullon had knowledge regarding or directly witnessed a number of critical events involving the group discharge, and relevant to Respondent's contention that the grocery employees were legitimately laid off for economic reasons. Castillo and Tavarez both testified that they informed Grullon that they intended to join the Union, along with Nunez, Santos, and Tejada. Riezgo denied that Grullon ever reported these conversations to him. Riezgo testified that he had a conversation with Grullon directing him to inform Santos and Tejada that they should not report for work on October 22, and Grullon then did so. Munoz testified that Grullon was present when Riezgo allegedly told him that the grocery department employees had been fired because Garcia had called the Union. Riezgo further testified that he rescinded Torreblanca's layoff based on a later conversation with Grullon on October 22, after Grullon told him that Torreblanca was necessary for the grocery department's operations. Finally, Grullon was present during meetings purportedly held in the grocery department during the spring and summer of 2011 to discuss a reduction of hours for grocery employees.

Despite Grullon's apparent knowledge regarding these crucial events, Respondent did not call him to testify at the hearing. The Board has found the drawing of an adverse inference appropriate in contexts where the witness not called to testify can corroborate testimony which would resolve an important and disputed issue of fact. *See Bally's Atlantic City*, 355 NLRB No. 218, at p. 7, n. 3 (2010) (adverse inference drawn from failure to call supervisors which allegedly prohibited employee from discussing union); *Ryder Student Transportation Services*, 333 NLRB 9, 13 (2001) (adverse inference drawn from failure to call manager who allegedly stated that the company would not negotiate with the union); *Grimmway Farms*, 314 NLRB 73, n. 2 (1994), *enf'd in relevant part*, 85 F.3d 637 (9th Cir. 1996) (adverse inference appropriately drawn from failure to call supervisor who served as translator during allegedly unlawful statements regarding postponement of health insurance benefits). An adverse inference may

also be appropriate based upon the failure to call a manager or supervisor who participated in adverse employment decision-making. *Clinton Electronics Corp.*, 332 NLRB 479, 497 (2000), *enf'd in part*, 284 F.3d 731 (7th Cir. 2002); *Brookfield Dairy*, 266 NLRB 698, 699 (1983). As a result, I find it appropriate to drawn an inference that had Grullon would have corroborated General Counsel's witnesses regarding the events discussed above had Respondent called him to testify.

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In light of the above, I find it appropriate to impute Grullon's knowledge regarding the union activities of the grocery department employees to Respondent. It is well-settled that a statutory supervisor's knowledge of union activity is appropriately imputed to the employer, unless credible evidence establishes the contrary. Gestamp South Carolina, 357 NLRB No. 130, at p. 10 (2011); State Plaza Hotel, 347 NLRB 755, 756-757 (2006). Although Riezgo denied that Grullon informed him of the grocery department employees' union activity prior to the decision to discharge them, I find this testimony incredible. The evidence establishes that Riezgo, as the store's general manager, was present at the store virtually every day, and was directly involved in the store's day to day operations, monitoring both sales and payroll on a weekly basis. Riezgo testified that he both made the determination to discharge the grocery department employees (after discussions with Porfirio Damiani), and selected which employees to discharge. Indeed, Riezgo's testimony establishes that he was present at the store on October 22, and that he and Grullon discussed the fate of the grocery employees to be discharged prior to informing them that day that they were not to begin or continue working. In light of the Union's victory in the election among the meat department employees that month and the certification days earlier, it is simply implausible that this conversation did not involve the union activities of the grocery employees, which had been revealed to Grullon that very day. As a result, the facts and the reasonable inferences that they engender, in addition to the adverse inference appropriately following from Respondent's failure to call Grullon as a witness, establish that there is insufficient credible evidence to rebut the imputation of Grullon's knowledge to Respondent.

Thus, the timing of the discharges also supports an inference that they were unlawfully motivated. It is well-settled that the discharge of employees within days, let alone hours, of learning of their union activity "strongly supports an inference of animus and discriminatory motivation." *Acme Bus Corp.*, 357 NLRB No. 82, at p. 26 (2011); see also Manorcare Health Services – Easton, 356 NLRB No. 39 at p. 3, 25 (2010), enf'd, 661 F.3d 1139 (D.C. Cir. 2011) (discipline of employee "just days" after her first public support for the union indicative of unlawful motivation). The timing of the discharges here, nearly immediately after Respondent learned of the grocery employees' union activity, strongly supports a conclusion that the discharges were unlawfully motivated.

Finally, the record contains evidence of Respondent's animus toward the employees' union activities. Specifically, I credit Munoz's testimony that when he returned to the store to pick up his final paycheck on October 24, Riezgo told him that the grocery employees had been discharged because Javier Garcia from the meat department had called the Union. Although Riezgo denied making this statement, Munoz testified that Grullon was present during this conversation. As discussed above, I that Respondent's failure to call Grullon as a witness warrants an adverse inference that if called to testify he would have corroborated Munoz, as

⁶ As discussed below, Riezgo provided inconsistent explanations for the reasons Respondent decided to implement layoffs, gave testimony which directly contradicted his previous sworn statement, and asserted that records were accurate which directly conflicted with documents submitted by Respondent during the investigation. Based upon these factors, in addition to considerations of demeanor, I find that Riezgo was generally a less than reliable witness.

opposed to Riezgo. Riezgo's comment explicitly attributing the grocery employees' discharges to their Union activity is obviously indicative of anti-union animus.

For all of the foregoing reasons, I find that General Counsel has established a *prima facie* case that the grocery employees were discharged as of October 22 in retaliation for their union activities.

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3. The Evidence does not Substantiate Respondent's Contention that the Grocery Department Employees were Discharged for Legitimate, Non-Discriminatory Reasons

Respondent claims that the grocery department employees were discharged as part of an economic layoff unrelated to their union activities. However, Respondent offered little probative evidence to support this assertion, and provided contradictory and shifting explanations regarding the various aspects of its decision. As a result, the evidence overall does not substantiate Respondent's contention that the grocery employees were discharged for economic reasons, and that the selection of specific employees for layoff was effected on a non-discriminatory basis.

Respondent's contentions regarding its decision to implement layoffs, and reduce the number of employees in the grocery department in particular, are contradictory and inadequately substantiated by probative evidence. For example, Respondent has repeatedly taken the position that Respondent's financial condition was not at issue, and that the layoffs were implemented solely as a means to reduce costs (Tr. 300-301; G.C. Ex. 12, p. 2; Respondent's Post-Hearing Brief). However, Riezgo testified that, as he informed Munoz and Tejada when discharging them, that he was laying the grocery employees off because business was slow (Tr. 383). These two assertions are obviously inconsistent. And even if Respondent purportedly did not implement the layoffs as a matter of financial exigency, how did it determine what specific cost savings were necessary or desirable? How did it calculate how many employees would have to be eliminated to obtain the cost savings that it sought?⁷ How did it determine that only the grocery department employees should be laid off, given Riezgo's testimony that at the time of the layoffs business was slow "across the whole store?" Despite the assertion of Respondent's counsel that Respondent conducted a "thorough analysis" before deciding to eliminate five full-time employees in the grocery department (G.C. Ex. 12, p. 2), Respondent offered not a shred of documentary evidence to elucidate these matters. Indeed, Riezgo testified that he did not review any documents to make these decisions, and Respondent took the position at the hearing that it had no documents referring or relating to them (Tr. 32, 73; G.C. Ex. 4(a)). Instead, the sole evidence it offered was Riezgo's testimony that business was slow because he saw fewer customers in the store (Tr. 383).8 Given its inconsistent and unsupported assertions with respect to these issues. Respondent's failure to offer documentary evidence to substantiate the financial specifics of its decision-making indicates that its asserted layoff defense is pretextual. See, e.g., Valley Slurry Seal Co., 343

⁷ Current employee Jose Resio testified that Riezgo and Damiani held meetings in the spring and summer of 2011 to tell the grocery employees that "sales were down, so he needs to cut hours in order not to fire us" (Tr. 310). However, Respondent offered no explanation as to why it eventually decided to lay off employees, as opposed to reduce the hours of all employees in the grocery department. Indeed, Resio admitted that after the other grocery employees were laid off, he continued to work not only full-time but overtime hours every week (Tr. 317-320).

⁸ Respondent introduced into evidence its payroll records for the grocery department, for the period January 22, 2011 through December 31, 2011. While these records are incomplete, the information they contain does not show a substantial decline in the hours worked by the grocery department employees during the eight months prior to the layoffs, and in fact demonstrates that the grocery employees worked overtime every week until the layoffs occurred.

NLR 233, 250-251 (2004) (contradictory and uncorroborated oral testimony insufficient to establish economic layoff defense); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (same). Respondent's failure to provide any coherent explanation for its focus on the grocery department when determining where layoffs should occur is also suspect. *See Intermet Stevensville*, 350 NLRB 1270, 1275 (2007) (selection of job classification for layoffs suspicious where manager unable to explicate its relation to Respondent's underlying reason for implementing reductions).

Even if Respondent had convincingly supported its assertion that it intended to reduce payroll, and chose the grocery department, for legitimate reasons, the timing of that decision's implementation would be extremely suspect. Riezgo testified that he and Porfirio Damiani review the store's payroll on a weekly basis, and that Damiani began insisting that he reduce staff at the end of 2009, raising the issue with him two to three times every month after that. Despite this incessant urging, however, no action was taken until October 2011, on the very day that Grullon was informed of the grocery employees' union activities. ⁹ The Board has generally found employer motivation suspect where precipitous layoffs immediately follow protected employee activity, in the context of long-standing financial issues. See, e.g., Addicts Rehabilitation Center Fund, 330 NLRB 733, 743-744 (2000) (discharges unlawful where evidence established that prior to union activity Respondent "conducted business as usual, despite a burgeoning deficit and recurring cash-flow problems"). In fact, the evidence demonstrates that Respondent hired ten new employees in its meat department and three new employees in its grocery department since Porfirio Damiani's exhortations to reduce payroll began (G.C. Exs. 5, 6). Addicts Rehabilitation Center Fund, 330 NLRB at 744 (hiring during time of asserted financial difficulty evidence that layoff defense is pretextual). In addition, although Riezgo claimed in his testimony that he made the decision to lay off the grocery employees during the third week in October based upon "how slow the business got," Respondent's payroll records indicate that every grocery department employee worked overtime during the weeks ending October 15 and 22.10 The availability of work, let alone overtime work, during the period immediately preceding the layoffs militates against a finding that they were implemented for legitimate economic reasons. Intermet Stevensville, 350 NLRB at 1275; Valley Slurry Seal Co., 343 NLRB at 233. Nor did Respondent make any effort to explain why, if business was slow during the third week in October, it did not anticipate that business would pick up again during the first week of the next month, given what Riezgo described as the typical pattern of Respondent's business.

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Furthermore, I find that the evidence establishes that Respondent had never laid off employees prior to the grocery employees' union activities in October 2011. During his testimony, Riezgo initially claimed that in the past Respondent had conducted economic layoffs (Tr. 78). However, in his affidavit provided during the investigation, Riezgo stated that Respondent had never previously discharged employees for financial reasons (Tr. 94). When confronted with these contradictory assertions, Riezgo contended that prior to October 2011 payroll was reduced through attrition (Tr. 96-98). However, Respondent's payroll records indicate that Respondent employed as many employees as of October 22 as it did in January of 2011. As a result, I find Riezgo's statement in his affidavit that employees had never before

⁹ As discussed above, Resio testified that Riezgo and Damiani told the grocery employees during meetings in the spring and summer of 2011 that their hours would be reduced. Respondent provided no evidence to explain its failure to implement a reduction in hours at that time.

While the testimony at the hearing demonstrates that Riezgo sent employees home early if he believed that there was insufficient work for them, Respondent's payroll records indicate that he did not do so in October 2011, as all grocery employees for whom information is available worked at least forty hours per week that month prior to their layoff.

been discharged for economic reasons to be the more reliable characterization of Respondent's typical employment practices. Respondent's departure from its past practices in such a manner militates in favor of a finding that its motives for doing so were unlawful. *Jaycee Electric*, 335 NLRB 568 (2001), *enf'd*, 56 Fed.Appx. 102, 174 LRRM 2928 (3rd Cir. 2003).

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I also find that the abrupt and haphazard manner in which the layoffs were implemented is indicative of pretext. If Respondent truly had developed a coherent, coordinated strategy which it was merely implementing by laying off a previously established number of employees, it would not have suddenly sent the employees home in the middle of their shifts, or called them while they were traveling to work, to inform them that their employment was ending. Indeed, Riezgo would not have laid off an "essential" employee (Torreblanca) in error, only to rescind that layoff later. In this regard, I find Riezgo's purported inability to remember exactly when he and Porfirio Damiani made the decision to lay off the grocery employees revealing. Overall, the manner in which the layoffs were implemented suggests not a comprehensive plan but a panicked scramble, immediately after management was informed that the grocery employees were engaged in union activity. These facts suggest that Respondent's economic layoff defense is pretextual. See Pacific Design Center, 339 NLRB 415, 419 (2003) ("abrupt" implementation of layoff evidence of pretext).

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Finally, Respondent's assertion that it chose the specific grocery employees to layoff by applying reverse seniority order is contradicted by the documentary evidence. It is well-settled that contradictory justifications, or evidence, regarding the selection of specific employees for layoff constitute evidence that an asserted economic rationale for discharges is in fact pretextual. *Intermet Stevensville*, 350 NLRB at 1275 (Respondent managers' inconsistent testimony regarding selection of specific employees for layoff evidence of unlawful motive); *Valley Slurry Seal Co.*, 343 NLRB at 251 (selection of specific employees for layoff suspect when contradicted by documentary evidence). Here, Respondent initially contended during the investigation that the following were accurate seniority or hiring dates for the grocery employees it employed as of October 22:

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"Inside" Section

	Ernesto Grullon	April 1, 2006
	Concepcion Torreblanca	April 1, 2006
35	Humberto Coronel	April 1, 2006
	Jose Resio	April 1, 2006
	Juan Munoz	June 3, 2006
	Manuel Tavarez Nunez	November 10, 2006
	Barido Rodriguez Tejada	March 28, 2010
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"Outside" Section

Jesus Morel	April 12, 2008
Pedro Castillo	April 20, 2011
Ramon Santos	May 28, 2011

(G.C. Ex. 12)

However, the payroll records provided by Respondent, in evidence as Respondent's Exhibit 3, indicate the following seniority dates, after the phrase "Hiring Date":

"Inside" Section

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Ernesto Grullon	July 31, 2008 (R.S. Ex. 3(c))
Concepcion Torreblanca	July 31, 2008 (R.S. Ex. 3(c))
Humberto Coronel	July 31, 2008 (R.S. Ex. 3(c))
Manuel Tavarez Nunez	July 31, 2008 (R.S. Ex. 3(h))
Jose Resio	August 2, 2008 (R.S. Ex. 3(a), (c))

"Outside" Section

Ramon Santos July 31, 2008 (R.S. Ex. 3(g))

Jesus Morel August 2, 2008 (R.S. Ex. 3(c))

Pedro Castillo August 6, 2008 (R.S. Ex. 3(l))

There are no seniority dates for Juan Munoz and Barido Rodriguez Tejada contained in Respondent's Exhibit 3.

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Although Riezgo contended in the course of authenticating Respondent's Exhibit 3 that the information it contains was accurate, the seniority dates therein conflict with the seniority dates previously provided to the Region during the investigation. Respondent made no effort to explain these obvious discrepancies through its witnesses, and offered no other documentary evidence to substantiate its contention that it conducted the grocery department layoffs in inverse seniority order. Indeed, Respondent's attorney contended at the hearing that Respondent had no personnel files. If Riezgo's testimony that the information contained in Respondent's Exhibit 3 is accurate is to be believed, it would create significant doubt as to whether Respondent did in fact conduct the layoffs in inverse seniority order. At the very least, it would establish that Santos and Tavarez Nunez, who were laid off, have more seniority than Morel and Resio, who were not. In any event, I find that the conflicting documentary evidence and testimony offered by Respondent on the issue is insufficient to establish accurate seniority dates for the grocery department employees. As a result, I find that the evidence overall does not substantiate Respondent's contention that it selected the specific grocery employees for layoff on the basis of seniority.

For all of the foregoing reasons, the evidence does not support Respondent's assertion that it discharged the grocery department employees on October 22 as an economic layoff. The evidence instead indicates that the discharges were motivated by the employees' union activity.

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- C. Respondent Violated Sections 8(a)(1) and (3) by Discharging Carlos Uceta Sanchez in Retaliation for his Union and Protected Concerted Activities
 - 1. General Principles and the Parties' Positions

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The Complaint in Case No. 2-CA-070807 alleges, and General Counsel argues, that Sanchez was discharged in retaliation for his union and other protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act. Under Section 8(a)(1) of the National Labor Relations Act (the Act), an employer may not "interfere with, restrain or coerce employees in the

exercise of the rights guaranteed" by Section 7 of the Act. An employee engages in protected concerted activity when they "act with or on the authority of other employees," and not solely on their own behalf. *Meyers Industries, Inc.*, 268 NLRB 493, 496 (1984) ("*Meyers I*"), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *on remand, Meyers Industries, Inc.*, 281 NLRB 882 (1986) ("*Meyers II*"), *enf'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1981). Employee activity may be concerted where it arises out of prior group activity, where the employee acts either formally or informally on behalf of the group, or when the employee solicits other employees to engage in group action. *The TM Group, Inc.*, 357 NLRB No. 98, at p. 14 (2011), *quoting Asheville School*, 347 NLRB 877 (2006). Compensation is one of the primary terms and conditions of employment, and employee discussions of tips and tip policies constitute protected activity. *See*, *e.g., Edward's Restaurant and Lounge*, 305 NLRB 1097, 1098 (1992), *enf'd*, 983 F.2d 1008 (6th Cir. 1992); *Trayco of S.C.*, 297 NLRB 630, 634 (1990), *enf denied*, 927 F.2d 597 (4th Cir. 1991).

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General Counsel argues that because Sanchez was allegedly discharged for insubordination while engaged in otherwise protected concerted activity, his discharge should be evaluated using the analysis articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Respondent does not appear to contest the assertion that Sanchez was as a general matter engaged in protected concerted activity when discussing the theft of money and removal of the tip box on December 12. Respondent instead argues in its Post-Hearing Brief that Sanchez's alleged statement that Riezgo "treated the employees like shit" was "a personal verbal attack" on Riezgo, and was not protected by the Act. Respondent also claims that Sanchez quit during his conversation with Riezgo, and was not discharged.

The Atlantic Steel analysis requires the consideration of four factors: (i) the place of the discussion; (ii) the discussion's subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer's unfair labor practices. See, e.g., Plaza Auto Center, Inc., 355 NLRB No. 85 at p. 2 (2010), remanded, 664 F.3d 286 (9th Cir. 2011), citing Atlantic Steel, 245 NLRB at 816. These four criteria are intended to permit "some latitude for impulsive conduct by employees" during protected concerted activity, while acknowledging the employer's "legitimate need to maintain order." Plaza Auto Center, Inc., 355 NLRB No. 85 at p. 2. As the Board has stated, the protections of Section 7 must "take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses." Consumers Power Company, 282 NLRB 130, 132 (1986). Therefore, statements during otherwise protected activity lose the Act's protection only where they are "so violent or of such serious character as to render the employee unfit for further service." St. Margaret Mercy Healthcare Centers, 350 NLRB 203, 204-205 (2007), enf'd, 519 F.3d 373 (7th Cir. 2008), quoting Dreis & Krump Mfg. v. NLRB, 544 F.2d 320, 329 (7th Cir. 1976); see also Plaza Auto Center, Inc., 355 NLRB No. 85 at p. 3.

2. Sanchez's Activity did not Lose the Act's Protection Pursuant to Atlantic Steel

General Counsel concedes that the first component of the *Atlantic Steel* analysis, the place of the discussion, does not favor protection for Sanchez's statement. Sanchez's outburst was directed at Riezgo, and took place in the public area of the supermarket, near the meat

¹¹ Section 7 of the Act provides that "employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

department counter. Sanchez and Resio testified that there were meat department employees present, so that the confrontation could have undermined workplace discipline. Plaza Auto Center, Inc., 355 NLRB No. 85 at p. 2. In addition, the evidence establishes that there were a number of customers near the meat department at the time, who were close enough to the meat counter to have heard Sanchez's remarks. I note that the Board has held that the presence of customers during brief episodes of impulsive behavior in the midst of otherwise protected activity is insufficient to remove the activity from the ambit of Section 7's protection, absent evidence of disruption to the customers. Crowne Plaza LaGuardia, 357 NLRB No. 95 at p. 4-5 (2011) (presence of two hotel guests during employees' loud chanting and confrontation with manager insufficient to divest activity of statutory protection without evidence that services were disrupted); Goya Foods of Florida, 347 NLRB 1118, 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (brief episode of shouting inside supermarket insufficient to render activity unprotected in absence of evidence of customer disruption). However, neither of these cases involved the use of profanity or insults directed toward the managers or supervisors present. Crowne Plaza LaGuardia, 357 NLRB No. 95 at p. 2, fn. 6; Goya Foods of Florida, 347 NLRB at 1133-1134. While Respondent has not offered any evidence that services or customers were disrupted as a result of Sanchez's remarks, I find overall that the first of the Atlantic Steel factors militates against a finding that Sanchez's outburst remained protected.

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I find that the second *Atlantic Steel* criterion – the nature of the discussion – strongly favors a conclusion that Sanchez's activity remained protected. Sanchez and Riezgo's discussion involved the removal of the tip box, a matter directly relevant to the compensation of the meat department employees. The discussion was engendered by a series of concerted activities on the part of the meat department employees, including discussions among the employees regarding the theft of the tips and another employee's request that Riezgo review surveillance video of the meat department counter. It immediately followed Sanchez's protected concerted complaints to Riezgo and Anthony Damiani regarding the theft of money from the tip box, and his request that video be reviewed to determine the identity of the culprit. It is also undisputed that Sanchez's purportedly unprotected statement included the assertion that Riezgo was treating the employees like shit. As a result, the subject matter of the discussion addressed one of the core terms and conditions of the employees' employment, and the conversation was one of a series of concerted activities by Sanchez regarding the issue. *Plaza Auto Center, Inc.*, 355 NLRB No. 85 at p. 2 (discussion involving intemperate comments addressed protected concerted activity pertaining to compensation).

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I also credit Sanchez's testimony that when he asked Riezgo whether the tip box was being temporarily or permanently removed, Riezgo responded that the tip box was a problem, and that all of the problems in the store were being caused by the meat department employees. I find it plausible to conclude that this remark was a reference to the union organizing and the Union's certification as the bargaining representative of the meat department employees two months earlier. As discussed below when evaluating Respondent's *Wright Line* defense, I find that Riezgo's account of his interactions with Sanchez on the day of his discharge is contradicted by more credible testimony and undisputed events. In addition, Riezgo's statement to Sanchez that the employees in the meat department are causing all the problems is consistent with his statement to Munoz that the grocery employees had been discharged because Javier Garcia, "the guy from the meat department," had contacted the Union on their behalf. As a result, I credit Sanchez's testimony that Riezgo complained that the meat department employees were causing problems in the store prior to Sanchez's outburst.

¹² Given the hourly wages that the meat department clerks received, the total weekly tips divided between them would not have been inconsequential.

Overall, because the subject matter of the conversation involved protected concerted activity, and Riezgo complained about the employees' union activities prior to any intemperate remark on Sanchez's part, this factor strongly militates in favor of a finding that Sanchez's activity remained protected under the Act.

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I find that the third of the Atlantic Steel factors also militates in favor of protection. The testimony regarding Sanchez's allegedly insubordinate statement differs, with Sanchez, Riezgo, and Resio testifying that Sanchez said that Riezgo and Respondent treated the employees, and Sanchez himself, "like shit," and Beato claiming that Sanchez added that Riezgo was "more shit" or "the bigger shit." I find that the weight of the evidence – the testimony of Sanchez. Riezgo, and Resio – establishes that Sanchez did not call Riezgo a "shit." In any event, the use of the word "shit," even to refer to Riezgo himself, is insufficient to divest Sanchez's activity of the Act's protection. See Plaza Auto Center, 355 NLRB no. 85 at 2-5 (employee's activity remained protected, despite reference to owner as a "fucking motherfucker," "fucking crook," and "asshole," as "a single verbal outburst of insulting profanity does not exceed the bounds of the Act's protection"); Tampa Tribune, 351 NLRB 1324, 1324-1325 (2007), enf denied, 560 F.3d 181 (4th Cir. 2009) (employee called Vice President a "stupid fucking moron"); see also Alcoa, Inc., 352 NLRB 1222, 1225-1226 (2008) (employee referred to supervisor as an "egotistical fucker"); Burle Industries, 300 NLRB 498 (1990), enf'd, 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a "fucking asshole"). In addition, although Sanchez made his comments directly to Riezgo, there is no evidence that his outburst involved threats or physically intimidating conduct. See Plaza Auto Center, 355 NLRB No. 85 at p. 3-4 (nature of outburst "not so opprobrious" as to deprive employee of statutory protection where no evidence of physical harm or threatening conduct); Tampa Tribune, 351 NLRB at 1326 (employee's outburst remained protected where unaccompanied by physical conduct, threats, or confrontational behavior). As a result, I find that the third component of the Atlantic Steel analysis favors a finding that Sanchez's activities remained protected.

The fourth component of the Atlantic Steel analysis requires a consideration of whether 30 the employee's outburst was provoked by the employer's unfair labor practices. The Board has held in this regard that the provocation need not be explicitly alleged as an unfair labor practice. so long as the statement evinces an intent to interfere with protected rights. Network Dynamics Cabling, Inc., 351 NLRB 1423, 1427-1429 (2007) (employee outburst provoked by manager's admonishment that he cease engaging in union activity); Overnite Transportation, 343 NLRB 35 1431, 1437-1438 (2004) (supervisor provoked union steward's intemperate remarks by refusing to discuss discharges of other employees, where steward was lawfully seeking information relevant to possible grievances). Here, the evidence establishes that prior to Sanchez's outburst, Calderon and Riezgo had sought to remove the tip box. According to Sanchez's account, he asked Riezgo whether the tip box was being removed permanently or on a 40 temporary basis, and Riezgo responded that he no longer wanted to tip box on the counter, because it was causing problems, adding that the problems in the store were caused by the meat department. This immediately precipitated Sanchez's statement that Respondent treated the employees like shit. Riezgo confirmed that prior to Sanchez's outburst, Sanchez asked why the tip box was being removed. Although Riezgo testified that he informed Sanchez that the 45 police had suggested removing it, he did not testify that he informed Sanchez that the box was being removed on a temporary, as opposed to permanent, basis. Given the Union's certification as the exclusive bargaining representative for the meat department employees, Respondent could not alter terms and conditions of employment without providing the Union with notice and the opportunity to bargain. See New Silver Palace Restaurant, 334 NLRB 290, 299-300 (2001) 50 (unilateral change in division of tips unlawful). I therefore find that Riezgo's threat to do precisely that, in a manner which would reduce the overall compensation for the meat

department clerks, provoked Sanchez's outburst within the meaning of the *Atlantic Steel* line of cases.

For the foregoing reasons, I find that three of the four factors articulated in *Atlantic Steel* support the conclusion that Sanchez did not lose the Act's protection during his conversation with Riezgo. As a result, I find that Respondent discharged Sanchez in retaliation for his union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

3. Respondent's Wright Line Defense is not Supported by the Evidence

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In addition to arguing that Sanchez's comments were not protected by Section 7, Respondent contends that Sanchez quit his job on December 12, and was not discharged. I find that the credible testimony regarding the events of that day does not substantiate this contention. Instead, the evidence overall establishes that Sanchez was discharged by Riezgo.

As a preliminary matter, I find that General Counsel has established a *prima facie* case that Sanchez was discharged in retaliation for his Union and protected concerted activities within the context of the *Wright Line* analysis. The evidence establishes that Sanchez engaged in Union activities by serving as the Union's observer during the October 9 election in the meat department unit. As discussed above in connection with the second of the four *Atlantic Steel* factors, the record also establishes that Sanchez was engaged in protected concerted activity during his conversations with Riezgo regarding the theft of tips and removal of the tip box on December 11 and 12. The evidence demonstrates that Riezgo was aware of Sanchez's Union activity, as Riezgo attended the ballot count while Sanchez was serving as the Union's observer. Riezgo was also aware of Sanchez's protected concerted activity in December, which consisted in part of conversations with him. As discussed below, the evidence establishes that Riezgo was discharged in the course of these conversations, so that the timing of the discharge is suspect. This evidence is sufficient to constitute a *prima facie* case.

The sole evidence in the record to substantiate Respondent's claim that Sanchez guit is Riezgo's testimony. Riezgo testified that after Sanchez accused him of treating the employees like shit, he told Sanchez to take the rest of the day off and go home, and Sanchez responded that he would prefer to quit. However, Riezgo's testimony regarding his initial conversation with Sanchez was inconsistent and contradicted by that of more reliable witnesses. Riezgo initially contended that after he heard Sanchez say that Riezgo treated the employees like shit, he "didn't even speak to him," but just "walked away" and called Calderon. This version of the conversation was corroborated by the testimony of current employee Edwin Canela-Beato, which I credit. See Covanta Bristol, Inc., 356 NLRB No. 46 at p. 8 (2010) (testimony of current employees may be considered particularly reliable in that it is potentially adverse to their own pecuniary interests); Flexsteel Industries, 316 NLRB 745 (1995), enf'd, 83 F.3d 419 (5th Cir. 1996). Current employee Jose Resio's account of the conversation also contradicts the assertion that Sanchez quit. Resio testified that after Sanchez's remark, Riezgo told him to take the rest of the day off, and Sanchez replied that he would only leave the store if he was fired. Ultimately, either Canela-Beato or Resio's version of events is more reliable than that of Riezgo and more consistent with Sanchez's subsequent conduct.

Riezgo admitted that, despite having supposedly quit, Sanchez remained in the store and continued working, and that Calderon reported to him that Sanchez was refusing to leave. Sanchez testified that when Calderon returned to the meat counter he told Sanchez that he had to leave, and that after Sanchez demanded a letter discharging him, Calderon responded that he had to leave because Riezgo did not want him in the store. Although Calderon is currently employed by Respondent, and Respondent admitted that he is a supervisor within the meaning

of Section 2(11) of the Act, he was not called to testify at the hearing. As a result, Sanchez's account of his conversation with Calderon is unrebutted, to say the least.

Sanchez testified that he was then called to the office, where Riezgo told him that he was working until 5 p.m. (his shift was scheduled to end at 10 p.m.), and punched his timecard. Sanchez testified that he responded that he was scheduled to work until 10 p.m., and returned to his work area. Riezgo did not testify regarding this conversation, but stated that he directed Calderon to make up Sanchez's paycheck and tell him to go home. Sanchez testified that Calderon then returned to the meat department, told him to leave the work area because "Pedro doesn't want you in the store and he's paying your hours until today." Again, because Calderon did not testify, Sanchez's account of this interaction is unrebutted.

I find that the credible evidence as described above regarding the events of December 12 does not demonstrate that Sanchez quit his job, as Respondent contends. Instead, the evidence establish that Respondent discharged Sanchez in retaliation for his Union and protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act.

Conclusions of Law

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- 1. At all material times, the Respondent, 3815 9th Avenue Meat and Produce Corp., d/b/a Compare Supermarket, has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 25 2. At all material times, the Charging Party, United Food and Commercial Workers Union, Local 342, has been a labor organization within the meaning of Section 2(5) of the Act.
 - 3. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, and Barido Rodriguez Tejada on October 22, 2011 in retaliation for their union activities.
 - 4. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Carlos Uceta Sanchez on December 12, 2011 in retaliation for his union activities and his protected concerted activities.

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5. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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The Remedy

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

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Having discriminatorily discharged Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, and Barido Rodriguez Tejada in retaliation for their union concerted activities, and having discriminatorily discharged Carlos Uceta Sanchez in retaliation for his union and protected concerted activities, Respondent must offer Castillo, Munoz, Nunez, Santos, Rodriguez Tejada, and Sanchez full reinstatement to their former positions or to substantially equivalent positions. Respondent must also make Castillo, Munoz, Nunez, Santos, Rodriguez Tejada, and Sanchez whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them, plus interest, in the manner prescribed in *F.W.*

Woolworth, 90 NLRB 289 (1950) and New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to the unlawful discharges, and to notify the employees in writing that this has been done and that the discharges shall not be used against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 13

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ORDER

Respondent 3815 9th Avenue Meat and Produce Corp., d/b/a Compare Supermarket, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Discharging or otherwise discriminating against employees in retaliation for their activities on behalf of United Food and Commercial Workers, Local 342.
- (b) Discharging or otherwise discriminating against employees in retaliation for their protected concerted activities.
- (c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act
- 30 (a) Within 14 days of the date of this Order, offer Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, Barido Rodriguez Tejada, and Carlos Uceta Sanchez full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights and privileges previously enjoyed.

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- (b) Make Castillo, Munoz, Nunez, Santos, Rodriguez Tejada, and Sanchez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.
- 40 (c) Within 14 days of the date of this Order, remove from all files any reference to the unlawful discharges, and within 3 days thereafter, notify Castillo, Munoz, Nunez, Santos, Tejada, and Sanchez in writing that this has been done and that the discharges will not be used against them in any way.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

¹³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- (e) Within 14 days after service by the Region, post at its supermarket at 3815 9th Avenue, New York, New York, copies of the attached notice marked "Appendix." Copies of 5 the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed 10 electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these 15 proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 2011.
 - (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC, July 20, 2012.

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Lauren Esposito
Administrative Law Judge

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you in retaliation for your activities on behalf of United Food and Commercial Workers, Local 342.

WE WILL NOT discharge or otherwise discriminate against you in retaliation for your protected concerted activities.

WE WILL within 14 days of the date of the Board's Order, offer Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, Barido Rodriguez Tejada, and Carlos Uceta Sanchez full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, Barido Rodriguez Tejada, and Carlos Uceta Sanchez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Pedro Castillo, Juan Munoz, Manuel Tavarez Nunez, Ramon Santos, Barido Rodriguez Tejada, and Carlos Sanchez, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

		(Representative)	(Title)	
Dated	Ву			
		(Employer)		
			COMPARE SUPERMARKE	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
26 Federal Plaza, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346